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IN THE

Supreme Court of the United States

October Term, 1936

No. 178 - 183

IN THE MATTER OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Debtor.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., Petitioners,
vs.
J. HAMILTON CHEETON, Et Al., Etc., Respondents. No. 3088

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., Petitioners,
vs.
METROPOLITAN LIFE INSURANCE COMPANY, Respondents. No. 3089

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., Petitioners,
vs.
CENTRAL HANOVER BANK AND TRUST COMPANY, Et Al., as Trustees, Etc., Respondents. No. 3090

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., Petitioners,
vs.
THE NATIONAL CITY BANK OF NEW YORK, as Trustee, Etc., Respondents. No. 3091

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., Petitioners,
vs.
JOHN C. TRAFFAGEN, Et Al., Etc., Respondents. No. 3092

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., Petitioners,
vs.
JAMES G. BLAINE, Et Al., Etc., Respondents. No. 3093

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CARTER H. HARRISON, Jr., et al.,
as the Protective Committee for The Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock.

By LOY N. McINTOSH, Their Attorney
135 South LaSalle Street
Chicago, Illinois

McGOVERN AND HENDERSON, INC., CHICAGO

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IN THE

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October Term, 1946

No.....

IN THE MATTER OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Debtor.*

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
J. HAMILTON CHESTON, Et Al., Etc., *Respondents.*
No. 9203

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
METROPOLITAN LIFE INSURANCE COMPANY, *Respondent.*
No. 9204

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
CENTRAL HANOVER BANK AND TRUST COMPANY, Et Al., as Trustees, Etc., *Respondents.*
No. 9205

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
THE NATIONAL CITY BANK OF NEW YORK, as Trustee, Etc., *Respondent.*
No. 9206

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
JOHN C. TRAPHAGEN, Et Al., Etc., *Respondents.*
No. 9207

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
JAMES G. BLAINE Et Al., Etc., *Respondents.*
No. 9208

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Carter H. Harrison, Jr., Stephen V. R. Crosby, Charles F. Grey and George E. Pike, as the Protective Committee for The Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock,

respectfully pray that a writ of Certiorari issue to review the order and judgment of the United States Circuit Court of Appeals for the Seventh Circuit (R. 332) which was entered on the 21st day of February, A. D. 1947, and in connection with which order and judgment petitioners filed their petition for rehearing, which petition, by order of said Court was, on the 7th day of April, A. D. 1947, denied (R.354), and which order and judgment was as follows:

> "The order of the District Court refusing to confirm the plan and referring the proceedings to the Interstate Commerce Commission is vacated, and the case is remanded to the District Court with instructions to confirm the plan."

OPINIONS BELOW.

The opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division (R. 249-254), was filed June 28, 1946. It has not been reported. The opinion and order of the United States Circuit Court of Appeals for the Seventh Circuit (R. 332) was filed on February 21, 1947, petition for rehearing was denied on April 7, 1947 (R. 354) and is reported in Fed. 160(2d) 942.

JURISDICTION.

Jurisdiction to issue the Writ requested is found in the provisions of Section 24(c) of the Bankruptcy Act and Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A., Sec. 347(a)).

STATUTES INVOLVED.

The pertinent provisions of the Bankruptcy Act, as amended, as follows:

Sub-Section (f), Section 77:

> "Upon *confirmation* by the judge, the provisions of the plan and of the order of confirmation shall, *subject to the right of judicial review,* be binding * * * ."

Sub-Section (e), Section 77:

"* * * If the judge shall *not confirm* the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor and enter an order in which he shall either dismiss the proceedings or, *in his discretion*, and on motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. * * *" (Italics Supplied)

STATEMENT.

The Chicago, Rock Island and Pacific Railway Company, principal debtor, a railroad corporation, on June 7, 1933, filed its petition in the District Court of the United States for the Northern District of Illinois, Eastern Division, stating that it was unable to meet its debts as they matured, and that it desired to effect a plan of reorganization under Section 77 of the Act of July 1, 1898, entitled, "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," as amended. The District Court, on June 7, 1933, approved the petition as properly filed, and authorized the debtor to continue in possession and control of its properties and assets. Thereafter certain railroad corporation subsidiaries of the principal debtor filed similar petitions in the same proceedings. Each of said petitions stated that the respective petitioner desired to effect a plan of reorganization in connection with a plan of reorganization of the principal debtor. Said petitions were approved by the District Court as properly filed. On November 22, 1933, trustees of the assets of the several debtors, effective December 1, 1933, were appointed. Such appointment was made permanent by order entered December 28, 1933. The trustees first appointed took possession of the properties and assets of the several debtors on December 1, 1933, and

since that time they, or their respective successors in office, have continued in possession and control of the debtor's properties and the operation thereof.

Plans of reorganization were presented to the District Court and the Interstate Commerce Commission by the principal debtor on July 15, 1936, and by others on or about July 20, 1938. Hearings on said plans were held by the Interstate Commerce Commission beginning October 6, 1936, the final hearing being closed on July 7, 1938. The Commission issued its report and order on October 31, 1940, approving a plan of reorganization for the debtors, to which various petitions for modification were filed, and on July 31, 1941, the Commission issued its supplemental report and order wherein it modified the plan in certain respects. To eliminate certain errors and inconsistencies in the approved plan, the Commission issued a further supplemental report and order on October 21, 1941, and again on April 6, 1942. After hearings were had upon the said plan of reorganization, as modified, which hearings were concluded on October 17, 1941, the District Court, on June 31, 1943, filed its opinion approving the said plan except as to two matters. On June 25, 1943, the District Court entered an order referring the proceedings back to the Commission for further action in accordance with the applicable provisions of Section 77 of the Bankruptcy Act and the Court's opinion, and in addition for the Commission's determination in the first instance of certain matters decided in said Court order. The Commission, on September 1, 1943, held a hearing, and thereafter made its supplemental report and order dated January 23, 1944, approving a further modified plan of reorganization containing modifications in accordance with the order of the District Court referring the proceedings back to the Commission.

On June 15, 1945, the District Court entered its order approving the plan of reorganization, as modified by the Commission.

On June 20, 1946, the United States Circuit Court of Appeals for the Seventh Circuit entered its order and judgment affirming the order of the District Court which approved the plan of reorganization of the debtor.

On February 26, 1946, the Commission certified to the District Court that (a) 75.78% of the creditors of Class 14, holding $1,967,000.00 principal amount of the debtor's 4½% Gold Bonds, due May 1, 1960, voting on the plan had rejected the plan (R. 96); and (b) 80.62% of the creditors of Class 21-A, holding $119,000.00 principal amount of Little Rock and Hot Springs Western Railroad Company First Mortgage 4% bonds, due July 1, 1939, voting on the plan had rejected the plan (R. 98).

On June 11, 1946, in the exercise of the discretion which is vested solely in the District Court under sub-Section (e) of Section 77 of the Bankruptcy Act, the District Court, after due notice to all parties in interest, held a hearing to determine (i) whether or not the plan made adequate provision for fair and equitable treatment for the interests and claims of those rejecting it, (ii) whether or not such rejection was reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts, and (iii) whether or not the plan conformed to the requirements of clauses 1 to 3, inclusive, of the first paragraph of Sub-Section (e) of said Section 77 (R. 168-248). On June 28, 1946, the District Court filed its memorandum opinion and entered its order, namely:

> "(1) The plan of reorganization of the debtor approved by the Court in its order entered on June 15, 1945, be not confirmed, and (2) case be referred back to the Interstate Commerce Commission pursuant to

> sub-Section (e) of Section 77 of the Bankruptcy Act, as amended, for further proceedings in accordance with the applicable provisions of said Section 77 and in accordance with the opinion of the Court, including the question of modifications of the plan or the proposal of new plans" (R. 254-255).

By its order refusing to confirm the plan, the District Court, in the exercise of the discretion, *which is vested solely in it,* sustained the dissenting votes of the two classes of creditors and refused to invoke the so-called "cram down" provisions of Sub-Section (e) of Section 77 of the Bankruptcy Act (R. 249-255).

Six appeals were taken from the order of the District Court refusing to confirm the plan, being Cases 9203 to 9208, both inclusive, in the United States Circuit Court of Appeals for the Seventh Circuit.

On February 21, 1947 (petition for rehearing denied April 7, 1947), the United States Circuit Court of Appeals for the Seventh Circuit entered its judgment and order, namely:

> "The order of the District Court refusing to confirm the plan and referring the proceedings to the Interstate Commerce Commission is vacated, and the case is remanded to the District Court with instructions to confirm the plan." (R. 332) (160 Fed. (2d) 942.)

On May 6th, 1947, the United States Circuit Court of Appeals for the Seventh Circuit caused its mandate to be filed in the District Court in connection with the aforesaid order and judgment.

MOTION.

These petitioners respectfully pray that an order may be entered forthwith by this Court prohibiting the District Court of the United States for the Northern District of Illi-

nois, Eastern Division, until the further order of this Court, from following the mandate of the United States Circuit Court of Appeals for the Seventh Circuit, which directed the District Court to confirm the plan of reorganization of the debtor.

QUESTIONS PRESENTED.

A. The United States Circuit Court of Appeals for the Seventh Circuit decided for the first time in railroad reorganization proceedings under Section 77 of the Bankruptcy Act that *an appeal lies from an order* of the District Court *refusing to confirm* a plan of reorganization.—This is an important question of Federal law which has not been but which should be settled by the Supreme Court of the United States.

B. The United States Circuit Court of Appeals for the Seventh Circuit, in refusing to dismiss the appeal for want of jurisdiction, without assigning any reason therefor, has rendered a decision which is in direct conflict with its own decision in *Gilbert vs. Securities and Exchange Commission*, 146 Fed. (2d) 513 (Dec. 20, 1944), which held that no appellate jurisdiction existed because no final order had been entered by the District Court.

C. The United States Circuit Court of Appeals for the Seventh Circuit has rendered a decision in this case in conflict with the decision of the Second Circuit, *Knight, et al. vs. Wertheim & Co., et al.*, 158 Fed. (2d) 838. The Seventh Circuit held, in this case, that creditors of a railroad, *upon the refusal* of the District Court *to confirm a plan of reorganization, are aggrieved parties, and have an appealable interest*, whereas in the Second Circuit that Court held that creditors are not aggrieved parties upon the refusal of the District Judge to confirm a reorganization plan, and have no appealable interest.

D. (i) During the pendency before the Interstate Commerce Commission of a referred plan of reorganization of a debtor railroad by the District Judge, and (ii) before the Interstate Commerce Commission had reported back to the District Judge, the United States Circuit Court of Appeals, without the Interstate Commerce Commission being a party, took jurisdiction on an appeal and entered its judgment and order directing the District Judge to set aside his order refusing to confirm and of re-reference to the Interstate Commerce Commission, and to confirm the plan of reorganization, thereby invading the supreme, exclusive and plenary jurisdiction of the Interstate Commerce Commission to complete its investigation and to report back to the District Judge.

E. Since this is the *first case* which has been presented to this Court wherein (i) certain classes of creditors have rejected a plan of reorganization for a railroad, and (ii) the District Court, by reason of said rejection and chain of circumstances, (a) refused to exercise the so-called "cram down" provisions of Sub-Section (e), Section 77, and (b) referred the plan of reorganization back to the Interstate Commerce Commission for further consideration, it is essential, in the proper administration of the Bankruptcy Act, that this Court should settle:

1. The procedure to be followed by the District Judge subsequent to the approval of a plan by the District Judge.

2. The circumstances under which the District Judge must preemptorily exercise the so-called "cram down" provisions of Sub-Section (e), Section 77.

3. The limits of discretion, if any, which remain vested in the District Judge subsequent to the order of approval in cases where creditors, on vote, have refused to approve the plan of reorganization.

4. Whether an order of the District Court refusing to confirm a plan of reorganization is a final or appealable order.

5. Whether, when the District Judge has refused to confirm a plan of reorganization and refers the plan of reorganization back to the Interstate Commerce Commission, all courts have lost jurisdiction over such plan of reorganization of a debtor railroad until the Commission has again certified back to the District Judge a subsequent plan of reorganization.

6. What jurisdiction, if any, is vested in the United States Circuit Court of Appeals under Section 77 of the Bankruptcy Act, as amended, to allow an appeal from an order of the District Judge refusing to confirm a plan of reorganization.

7. Whether all orders and judgments of the Circuit Court of Appeals on an appeal from an order of the District Judge refusing to confirm the plan of reorganization, are *coram non judice*, null and void, and binding on no one, for the reason that the Circuit Court of Appeals is without jurisdiction on such an appeal.

8. Whether the Circuit Court of Appeals is empowered, without statutory jurisdiction, to enter an order, regardless, merely because of expediency.

9. Whether the Interstate Commerce Commission is a necessary party in the Circuit Court of Appeals when an appeal has been taken from an order refusing to confirm a plan of reorganization and the question of the plan of reorganization has been referred to the Interstate Commerce Commission by the District Judge.

10. Whether the Circuit Court of Appeals has in effect the power to confirm a plan of reorganization, notwithstanding an adverse vote of a class or classes of creditors, or whether this power alone, by Section 77 of the Bankruptcy Act, as amended, is vested solely in the District Judge.

11. Whether the Circuit Court of Appeals can mandamus the District Judge as to what sort of an opinion he shall file in connection with a hearing on the confirmation of a plan of reorganization of a railroad.

12. Whether the Circuit Court of Appeals can override the District Judge as to discretionary powers, which are vested solely in the District Judge under Sub-Section (e) of Section 77 of the Bankruptcy Act, as amended.

13. What weight, under Federal Rules of Civil Procedure, Rule 52, U.S.C.A., following Section 723(c), must the Circuit Court of Appeals give to the opinion and findings of the District Judge on a confirmation hearing.

14. Whether judicial acts involving the exercise of discretion, and which from their nature and circumstances are controlled by the personal judgment of the court, are final, and whether they can be set aside on appeal except where there is an abuse of power.

15. Whether the power to confirm a plan of reorganization under Sub-Section (e), Section 77 of the Bankruptcy Act, notwithstanding an adverse vote of a class or classes of creditors, is discretionary, or is mandatory. If it is discretionary, has the Circuit Court of Appeals any power to compel a District Judge to exercise a discretion in the manner dictated by the Circuit Court of Appeals, or is the District Judge alone empowered to exercise the discretionary power of confirmation or refusal to confirm?

(Note: In all previous cases decided by the courts of appeal, including this Court, relating to the reorganization of a railroad under Section 77 of the Bankruptcy Act, as amended, there did not exist the question of jurisdiction of the appellate courts, for the reason that (1) the Interstate Commerce Commission had lost its jurisdiction over the plan by having certified the plan to the District Judge, and (2) the District Judge had confirmed the plan of reorganization. [Sub-Section (f) of Section 77 of the Bank-

ruptcy Act, as amended, clearly provides for *appellate review of an order of confirmation* by the District Judge, by the following language: "(f) *Upon confirmation* by the judge the provisions of the plan and the order of confirmation shall, *subject to the right of judicial review, be binding* * * * ".]).

This is the first case in railroad reorganizations in which an appeal has been taken from an order of the District Judge refusing to confirm the plan and in which the Circuit Court of Appeals has ruled that it has jurisdiction of such appeal, substituted its discretion for that of the District Court, and ordered the District Court, regardless of the District Judge's opinion, to confirm the plan of reorganization, notwithstanding the provisions of Sub-Section (e), Section 77 of the Bankruptcy Act, as amended, which provides: "If the judge shall not confirm the plan he *shall* file an opinion with a statement of his conclusions and his reasons therefor and enter an order in which he *shall* either *dismiss* the proceedings or *in his discretion*, and on motion of any party in interest, *refer* the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans." (Italics supplied) This mandatory direction to the District Judge *contains no language authorizing an appeal* from an order entered by the District Judge *refusing to confirm* a plan of reorganization, as is found in Sub-Sec. (f), which authorizes an appeal from an order *confirming* a plan.

REASONS FOR GRANTING WRIT.

[Notwithstanding Rule 52, Federal Rules of Civil Procedure, and what this Court has said on many occasions, particularly in *Reconstruction Finance Corp.* v. *Denver & Rio Grande Western RR. Co.*, 328 U.S. 495, that in view of the District Judge's familiarity with the reorganization his findings has a special weight, nevertheless the Circuit Court of Appeals refused to give any weight to the District

Judge's familiarity with the reorganization of the Chicago, Rock Island, it substituted its own findings of fact, and it directed the District Judge to set aside his order refusing to confirm and to enter an order confirming the plan. The Circuit Court of Appeals refused to follow the well-established rule that where a question of fact is involved and where in deciding a question of fact the District Judge has exercised a discretionary power, such exercise of discretion will not be reversed by the appellate courts unless a gross abuse of discretion shown. There was no abuse of discretion shown by the record in this case, and the District Judge, in refusing to confirm the plan, did exercise his discretionary power under Section 77(e).]

I.

The United States Circuit Court of Appeals for the Seventh Circuit decided for the first time in railroad reorganizations under Section 77 of the Bankruptcy Act, as amended, (i) that an *appeal lies from an order* of the District Court *refusing to confirm* a plan of reorganization, (ii) that the Circuit Court of Appeals has the power to direct the District Judge to set aside his opinion and order refusing to confirm a plan of reorganization of a railroad, and (iii) that the Circuit Court of Appeals may, notwithstanding the discretionary power vested in the District Judge, direct the District Judge to enter an order confirming the plan of reorganization.

A. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit shows upon its face a total want of jurisdiction of the subject matter in that it undertakes, while the case is pending before the Interstate Commerce Commission pursuant to a statutory, discretionary order of the District Court, to reverse by an order wholly *coram non judice.*

B. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit undertakes to dispose of the pendency of the case before the Interstate Commerce

Commission on the quaint theory that such pendency is but one in many steps in the execution of a bankruptcy proceeding. Reference to *Group of Investors* v. *Chicago, Milw. & St. Paul RR. Co.*, 318 U.S. 523, shows that the discretionary power to refuse to confirm a plan of a debtor railroad is vested solely in the judge of the District Court, under the following language appearing in the third paragraph of Sub-Section (e) of Section 77 of the Bankruptcy Act, as amended, namely:

> " * * * provided that if the plan has not been so accepted by the creditors and stockholders, the Judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it, that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all relevant facts, and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this Subsection (e): * * * If the Judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or in his discretion and on motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans * * * ."

C. The United States Circuit Court of Appeals for the Seventh Circuit had no jurisdiction on the appeal (i) because of the fact that the case, by order of the District Court, was then pending before the Interstate Commerce Commission, and (ii) because of the fact that the District Judge had refused to confirm the plan. [There is no provision under Section 77 of the Bankruptcy Act authorizing a judicial review of such an order by a court of appellate jurisdiction, *but there is an express mandatory provision in Section 77 as to what disposition shall be made of a plan of reorganization when the District Judge shall refuse*

to confirm. That mandatory provision is found in sub-Section (e) of Section 77 of the Bankruptcy Act, as amended, as follows:

> " * * * If the Judge shall *not confirm* the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and *enter an order* in which he shall *either dismiss* the proceedings, *or* in his discretion and on motion of any party in interest, *refer the case back to the Commission* for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. * * * "] (Italics ours.)

Nowhere in Section 77 proceedings is there any authority for the Circuit Court of Appeals to exercise appellate jurisdiction over an order of the District Judge refusing to confirm a plan of reorganization. If it was intended that there be such appellate jurisdiction, then the Congress would have inserted in the above quoted law a provision similar to that found in sub-Section (f) of Section 77 of the Bankruptcy Act, which reads: "(f) * * * *Upon confirmation* by the judge the provisions of the plan and of the order of confirmation shall, *subject to the right of judicial review,* be binding * * * :" (Italics ours.) Since the Circuit Court of Appeals had no jurisdiction of the subject matter of this cause, then its judgment and all other proceedings anterior and subsequent thereto are *coram non judice* and of no legal effect. Its judgment and order is a nullity, no one is bound to observe it, and, as the old legal saying goes, "it is a dead limb on the judicial tree."

The United States Circuit Courts of Appeal are courts of limited jurisdiction and no presumption of jurisdiction attaches to such courts. Jurisdiction must affirmatively appear from the record, and the record in this case clearly shows want of jurisdiction in the United States Circuit Court of Appeals of the subject matter. It was the duty of the United States Circuit Court of Appeals, as it is the

duty of this Court, to determine in the first instance whether or not jurisdiction existed in the United States Circuit Court of Appeals to allow the appeal from the order of the District Judge refusing to confirm the plan, and if it appears that jurisdiction is lacking, then it was the duty of the United States Circuit Court of Appeals to dismiss the appeal for want of jurisdiction. *Bors* v. *Preston*, (1888) 111 U.S. 252, 255; *Lion Mfg. Co.* v. *Chicago Flexible Shaft Co.* (7th Cir., 1939), 106 Fed. (2d) 930, 933; *Clark v. Paul Gray, Inc.* (1939), 306 U. S. 583; *Kvos, Inc.* v. *Associated Press* (1936), 299 U. S. 269; *Read* v. *Dickerson* (1941), 312 U.S. 656.

II.

The decision of the United States Circuit Court of Appeals for the Seventh Circuit is in direct conflict with its own decision in Gilbert v. Securities and Exchange Commission, 146 Fed. (2d) 513 (Dec. 20, 1944).

The arbitrary exercise of appellate power by the United States Circuit Court of Appeals for the Seventh Circuit in this case, without jurisdiction of the subject matter, is plainly contrary to the rule laid down by that Court in *Gilbert* v. *Securities and Exchange Commission,* and *Pike, et al.* v. *Same,* 146 Fed. (2d) 513 (1945, CCA 7th), wherein the same judges sat and concurred in that opinion as in this case. Without any reference to the *Gilbert* case which, while being a 77(B) proceeding in bankruptcy, was a precise analogue to a Section 77 proceeding, as to the point at issue, and the extensive reasoning therein set forth, the Circuit Court of Appeals saw fit to overrule and ignore its judgment in that case in exercising appellate power in this case, without assigning any reason therefor. The situation in the present case is even more acute than in the *Gilbert* case, *supra*, in that here the case was at the time the Circuit Court of Appeals exercised appellate jurisdiction, and now

is, actually pending before the Interstate Commerce Commission pursuant to a statutory, discretionary order entered by the District Judge on June 28, 1946, which order referred this case back to the Interstate Commerce Commission.

In any event, the reasoning of the Circuit Court of Appeals that the refusal to confirm the plan of reorganization and the reference back to the Interstate Commerce Commission for further proceedings could be ignored on the basis of a composite theory [*In re Chicago R. I. & P. Ry. Co., Cheston et al.* v. *Chase National Bank, et al.*, Nos. 9203-9208, 160 Fed. (2d) 942, p. 944: "Before we proceed to discuss the question involved we note that appellees have moved that the appeals be dismissed on the ground that the order refusing to confirm the plan adjudicated no rights of the parties. Section 24 (a) of the Chandler Act (11 U.S.C.A. Par. 47 (a)) gives the Circuit Courts of Appeal jurisdiction from courts of bankruptcy 'in proceedings in bankruptcy, either interlocutory or final * * * '. We agree with appellants that the development, approval, confirmation and consummation of a plan of reorganization are not mere steps of an ordinary lawsuit, and whether we consider the order interlocutory or final, the fact remains that the order was one of substance, entered in a proceeding in bankruptcy which this court has power to dispose of on the merits; hence the motion must be and it is, denied."] does violence to the statutory provision that after a reference back, of a plan of reorganization of a debtor railroad to the Commission, a condition precedent to the further exercise of judicial power by the courts over reorganization plans is specifically controlled by Section 77 of the Bankruptcy Act, as amended: "(d) * * * No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and is certified to the court * * * (e) Upon the certification of a

plan by the Commission to the court the court shall * * * " (Title 11, U.S.C.A., Sec. 205(e)). Not until the Interstate Commerce Commission, after a reference back to it, exhausts its administrative or exclusive, executive jurisdiction over plans of railroad reorganization and certifies to the judge the results of such submission is there any semblance of a justiciable controversy in so far as a reorganization plan of a debtor railroad is concerned. Upon the entry on June 28, 1946 of the order of the District Judge [(a) refusing to confirm the plan of reorganization of the debtor, and (b) referring the case back to the Interstate Commerce Commission pursuant to Sub-Section (e) of Section 77 of the Bankruptcy Act, as amended] the courts (original and Appellate) lost completely all jurisdiction over plans of reorganization of the Rock Island railroad, together with all power to do anything with reference to a reorganization plan of the railroad, until, pursuant to the provisions of said Sub-Sections (d) and (e), the Interstate Commerce Commission had again certified a plan of reorganization of the debtor railroad back to the District Judge. On June 28, 1946, the date on which the District Judge refused to confirm the plan of reorganization and referred the case back to the Commission, there was not and there is not now in existence any plan of reorganization of the Rock Island railroad under Section 77 of the Bankruptcy Act, as amended. The order of the District Judge refusing to confirm the plan of reorganization adjudicated no rights of the parties. By that order creditors remain creditors and stockholders remain stockholders of the debtor railroad. Creditors have their claims and that is all they have. Stockholders have their shares of stock and that is all they have, in so far as said order refusing to confirm is concerned. The order refusing to confirm was not a final order. The respective rights of the parties do not and cannot be fixed in a railroad reorganization proceeding until an order has been entered confirming a plan

of reorganization. Until an order confirming a plan is entered there is no appealable order as to a plan of reorganization. This rule was recognized by the Circuit Court of Appeals for the Seventh Circuit in *Gilbert* v. *Securities and Exchange Commission*, 146 Fed. (2d) 513 (1944), and in departing from the settled law in the Seventh Circuit in the *Gilbert* case, the Circuit Court of Appeals arbitrarily invaded the supreme, exclusive and plenary jurisdiction of the Interstate Commerce Commission, as well as the statutory, discretionary power of the District Judge. The assumption of jurisdiction by the Circuit Court in this case, and its judgment entered February 21, 1947, remanding the case to the District Court with instructions to confirm the plan, could well be termed a "judicial monstrosity" (*Gilbert* v. *Securities and Exchange Commission*, 146 Fed. (2d) 513). It is definite that under Section 77 (e) of the Bankruptcy Act, as amended (Title 11, U.S.C.A., Sec. 205 (e)), *there is vested in the District Judge solely*, and not in the Circuit Court of Appeals, nor in the Federal Appellate system, power to confirm or to refuse to confirm a plan of reorganization of a railroad. The District Court *is bound*, under Sub-Section (e) of Section 77 of the Bankruptcy Act, as amended, to make its own independent determination as to whether a plan of reorganization, after it has been rejected by a class of creditors: (1) makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; (2) that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and (3) that the plan conforms to the requirements of clauses 1 to 3, both inclusive, of the first paragraph of said Sub-Section (e). Since the District Court is so bound to make its own independent determination, the Circuit Court of Appeals, by its opinion in this case, usurped the power vested solely in the District Court and trespassed upon the sovereign power of the Interstate

Commerce Commission within its statutory scope (*Gilbert* case, *supra*). This being true, the review by the Circuit Court of Appeals for the Seventh Circuit was not only an idle and useless gesture, but seriously interfered with the orderly procedure contemplated in the reorganization of a railroad under Section 77 of the Bankruptcy Act, as amended (*Gilbert* case, *supra*). Congress did not, in Section 77 proceedings, provide for a review by any court having appellate jurisdiction of a *discretionary order authorized to be entered solely by the District Judge* as a condition precedent to the further exercise of a statutory, judicial power (*Gilbert* case, *supra*).

Without any record showing whatsoever that the appellants were aggrieved by the order of the District Judge refusing to confirm the plan of reorganization, and by the pendency of the Rock Island reorganization before the Interstate Commerce Commission, the opinion and judgment of the Circuit Court of Appeals for the Seventh Circuit in this case arbitrarily reversed the District Judge on the motion of appellants, who were not aggrieved parties. Nowhere in the opinion does it appear how or why or wherein the appellants, or any of them, were aggrieved by the order appealed from. The order of the District Judge in refusing to confirm the plan and referring it back to the Commission in no way diminished the rights of appellants. It did not increase their burdens. It did not detrimentally affect any of their rights. Creditors remained creditors and stockholders remained stockholders by the order refusing to confirm. All the order did was to refer to the Commission the entire question of the plan of reorganization for the Rock Island railroad. The order refusing to confirm took nothing from appellants, or any other party. In *Gilbert* v. *Securities and Exchange Commission*, 146 Fed. (2d) 513, the Circuit Court of Appeals for the Seventh Circuit, by Circuit Judge Major, said, at page 514:

> "Generally accepted is the legal tenet that no one may appeal from a judgment unless he has an interest therein direct, immediate, pecuniary and substantial. Speaking more specifically, a party has an appealable interest only when his property may be diminished, his burdens increased, or his rights detrimentally affected by the order sought to be reviewed. Applying the rationale thus stated, it seems rather plain that the orders complained of do not diminish petitioners' property, increase their burdens or detrimentally affect their rights.
>
> "This Court, *In re Michigan-Ohio Building Corp.*, 117 Fed. (2d) 191, on its own motion dismissed an appeal holding that appellants were not aggrieved and therefore had no appealable interest. In so doing we stated, at page 192 of 117 Fed. (2d): 'We are faced at the outset with the question obtruding from the face of the record as to whether appellants have such an interest or are to such degree aggrieved as to create in them the power of appeal.'"

No party has a vested right in a plan of reorganization of a railroad until an order of confirmation has been entered. Until an order of confirmation is entered the provisions of a plan of reorganization of a debtor railroad are binding upon no one. Any plan of reorganization, until confirmed, may be changed (the Rock Island plan was changed by order of the Commission on no less than four occasions). This is clearly supported by Sub-Section (f) of Section 77 of the Bankruptcy Act, as amended (Title 11, U.S.C.A., Sec. 205 (f)):

> "Upon the *confirmation* by the Judge the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, *be binding* upon the debtor, all stockholders thereof, including those who have not as well as those who have accepted it, and all creditors, secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." (Italics ours.)

(Note: Sub-Section (f) is the only provision authorizing judicial review of a Section 77 reorganization plan. *No judicial review is authorized except upon confirmation of a plan of reorganization.*) There is no authority in Section 77 or elsewhere for judicial review of an order of the District Court refusing to confirm a plan of reorganization. The Circuit Court of Appeals for the Seventh Circuit not only had no statutory jurisdiction on an appeal from the order of the District Judge refusing to confirm a plan of reorganization, but that Court, without assigning any reason therefor, reversed the position which it took in 1945 in the *Gilbert* case, *supra*.

III.

The United States Circuit Court of Appeals for the Seventh Circuit in this case rendered a decision in conflict with the decision of the Second Circuit, Knight, et al. v. Wertheim & Co., et al., 158 Fed. (2d) 838 (Dec. 31, 1946).

The United States Circuit Court of Appeals for the Seventh Circuit in this case rendered a decision in conflict with the decision of the Second Circuit in *Knight, et al.* v. *Wertheim & Co., et al.*, 158 Fed. (2d) 838, the Seventh Circuit holding in this case that creditors, upon the entry of an order by the District Judge refusing to confirm a plan of reorganization, are aggrieved parties and have an appealable interest, whereas the Second Circuit held that upon the refusal of the District Judge to confirm a plan of reorganization, creditors are not aggrieved parties and have no appealable interest. The proceedings in the Second Circuit were under Section 77(B), but that proceeding is an analogue to proceedings under Section 77.

IV.

Rule 52 ignored by Circuit Court.

Without waiver of the jurisidictional question hereinbefore raised, further reasons for granting the Writ exist:

A. Judicial actions which involve "discretion" and which from their nature and circumstances are controlled by the personal judgment of the court are final and cannot be set aside on appeal except where there is an abuse of power. The District Judge, under Sub-Section (e) of Section 77 of the Bankruptcy Act, as amended, in ascertaining whether or not (a) the plan made adequate provision for fair and equitable treatment for the interests or claims of those rejecting it, and (b) that such rejection was or was not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts, was not engaged in ascertaining indisputable facts. The District Judge was forming a judicial judgment, and largely a prophetic judgment regarding a maze of facts, as to each of which factors there was and is a basis for considerable difference of opinion. The District Judge, in reaching a conclusion that the plan should not be confirmed, exercised a discretion vested in him and him alone by Sub-Section (e), which was the power to determine questions to which no strict rule of law is applicable but which from their very nature and circumstances have to be controlled by the personal judgment of the court. The mere fact that the decision reached by the District Judge in refusing to confirm the plan differed from what might be alleged to be a reasonable viewpoint of appellants, who naturally were disappointed at the finding of the court, convinces no one that the discretion which was exercised by the court was abused. Discretion is abused when the judicial action is arbitrary, fanciful or unreasonable, which means that if reasonable men could differ as to the propriety of the action taken by

the trial court, then it cannot be said that the trial court abused its discretion. The holders of 75.78% of the total claims allowed as Class 14, and the holders of 80.62% of claims allowed as Class 21-A, *who we must assume were reasonable men,* rejected the plan of reorganization and thus differed in their opinion as to the fairness of the plan from the class of creditors who voted in favor of the plan. The District Judge, in refusing to confirm the plan, determined the fact that the creditors rejecting the plan were reasonably justified in so doing. The District Judge thus determined a question of fact to which no strict rule of law applies, but which from its nature and circumstances had to be controlled by the personal judgment of the court. The determination of this fact was one upon which reasonable men could differ. That being the case, and there being nothing in the record which in any way indicates that the exercise of this discretionary power on the part of the District Judge was arbitrary, fanciful or unreasonable, then the judgment of the District Judge in refusing to confirm the plan is final and cannot be set aside on appeal. (*In re Paloma Estates, Inc.,* 126 Fed. (2d) 72 (Certiorari denied 317 U.S. 684) (1942); *Kelso* v. *MacLaren,* 122 Fed. (2d) 867; *Delno* v. *Market Street Ry. Co., et al.,* 124 Fed. (2d) 965.)

The order of the District Judge refusing to confirm the plan of reorganization contained the following findings of fact (R. 254):

> "And the Court being satisfied and finding in the light of the additional evidence presented at said hearing on June 11, 1946, (a) that the plan does not make adequate provision for fair and equitable treatment for the interests or claims of the holders of the Convertible Bonds; (b) that the rejection of the plan by the hloders of the Convertible Bonds was reasonably justified in the light of the respective rights and interests of the holders of the Convertible Bonds and

> all the relevant facts; (c) that the plan does not conform to the requirements of clause (1) of the first paragraph of sub-Section (e) of Section 77 of the Bankruptcy Act, as amended, in respect to its treatment of the holders of the Convertible Bonds * * *."

The above findings were not indisputable facts, and they were findings upon which reasonable men could differ. Since an appeal was taken from those findings, there was unquestionably a dispute about such facts. These facts were determined by the Court in the exercise of a discretion vested solely in the District Judge under Sub-Section (e). There being a dispute with regard to the facts as to whether or not a plan of reorganization should be confirmed, the Circuit Court of Appeals in this case should have applied the same rule of law which it did in *In re A. Roth Company*, 125 Fed. (2d) 396. In that case the United States Circuit Court of Appeals for the Seventh Circuit said, page 398:

> "Determination of abuse of discretion involves the exercise by us of sound judgment upon the facts. If there is a controversy as to facts, and if the facts themselves largely define the wisdom of the discretion, review by the Appellate Court is seldom effective, and it should not be. The Appellate Court's review does not include trial court's discretion."

To the same effect are *Rules of Civil Procedure*. Rule 52(a) in part provides:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."

It has been repeatedly held by the Federal Appellate courts that where a question of fact is involved and where, in deciding a question of fact, the District Judge exercised a

discretionary power, such exercise of discretion will not be reversed by the Appellate courts unless a gross abuse of discretion is shown. (*Bostian* v. *Levich,* 134 Fed. (2d) 284; *Hultzman* v. *Tevis,* 82 Fed. (2d) 940; *Williamson* v. *Williams,* 137 Fed. (2d) 298.)

In *Reconstruction Finance Corp.* v. *Denver & Rio Grande Western RR. Co.,* 328 U.S. 495, this Court said:

> "In view of the District Judge's familiarity with the reorganization, this finding has special weight with us. See Federal Rules of Civil Procedure, Rule 52, 28 U.S.C.A., following Section 723(c)."

And in *Institutional Investors* v. *Chicago, Milwaukee & St. Paul RR. Co.,* 318 U.S. 523, at page 564, this Court said:

> "We would have a different problem if the District Court had failed to perform the functions which Section 77(e) places upon it, but it cannot be said that there is any such failure here. The District Court satisfied itself that the principles of priority as applied to these facts were respected * * * . Since such a determination rests in the realm of judgment rather than mathematics, there is an area for disagreement, but we are not performing the functions of the District Court under Section 77(e). Our role on review is a limited one. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is a warrant for the action of the District Court our task on review is at an end."

It is shown by the record, as we will point out hereinafter, that there was warrant for the action of the District Court when it refused to confirm the plan. That being the case, the United States Circuit Court of Appeals for the Seventh Circuit had no power to reverse the District Judge as to his findings of fact.

V.

Distinction from the Denver Case.

The United States Circuit Court of Appeals for the Seventh Circuit held in this case, 160 Fed. (2d) 945 (R. 336):

> "Under this statute, a rejection would not be reasonably justified unless the rejectors have a valid reason for rejecting the plan. If there is a rejection the Court will re-examine the plan, but if the plan is found to be fair and equitable to the dissenters they cannot use the elements making the plan fair and equitable as the basis of their rejection *(Reconstruction Finance Corp.* v. *Denver & Rio Grande Western RR. Co.*, 328 U.S. 495). Thus it is clear that the court's discretion is not unlimited, but is circumscribed and until the statute is satisfied no discretion is vested in the court."

The Circuit Court overlooked the fact that there were two important distinctions between this case and the *Denver* case. First, in this case the District Judge had refused to confirm the plan, whereas in the *Denver* case the District Judge had confirmed the plan. Second, in this case in refusing to confirm the plan the District Judge reached his decision in the light of additional evidence presented at the hearing on June 11, 1946 (R. 254), whereas the *Denver* decision was not based on additional evidence. The additional evidence which was before the Court at the hearing on the question of confirmation, and which showed "reasons to make their rejection reasonable may arise hereafter; for example, unanticipated large earnings might develop," (*Denver* case, *supra*) are as follows:

1. The order of the Interstate Commerce Commission dated December 6, 1946, increasing freight rates for railroads on an average of 17.6% and making permanent the 10% increase of passenger fares.

2. The major change in the nation's economy in the rate of interest for borrowed money.

3. Two classes of creditors entitled to vote, one by 75.78% and the other by 80.62% of those voting, have rejected the plan.

4. The improvement in asset position of the debtor since May 1, 1944 (R. 177-185, 193).

a. Net increase in investment in transportation property, May 1, 1944-April 30, 1946 (after normal depreciation but before amortization of defense projects)	$ 15,387,895.00
b. Increase in investment in affiliated companies in 1945	1,017,260.43
c. Cash on hand June 1, 1946, allocated to debt reduction	1,142,000.00
d. Cash on hand June 1, 1946, allocated to 1946 additions and improvements	12,313,130.00
e. Unallocated cash on hand June 1, 1946	10,997,108.00
f. New securities released to treasury by payment of Reconstruction Finance Corporation	28,169,202.00
g. Miscellaneous assets returned to treasury by payment of Reconstruction Finance Corporation	911,506.71
Total	$ 69,938,103.02

(The above statement of improvement in asset position is based upon the testimony of the Chief Clerk to the General Auditor of the Trustees of the debtor before the trial court on June 11, 1946 (R. 177-193)).

h. The decrease of the debts in the hands of the public between January 1, 1940 and April 30, 1946, $25,411,598.97. (R. 196)

i. (R. 198) The total amount of cash or cash equivalent as of March 31, 1946, the date last reported to the Interstate Commerce Commission, $82,272,199.08.

j. (R. 199) The net capital expenditures for the period January 1, 1940, to April 30, 1946, in the sum of $37,246,965.49.

k. (R 207) The earnings of the Rock Island in 1945 were 3.15 times the interest on all of the old indebtedness, including the Convertible 4½% and Little Rock Bonds, which voted against the plan, and as to 1944 the earnings were 5.27 times the total interest including those securities.

l. (R. 209) For the period January 1, 1941, to June 30, 1945, the average earnings of the corporation were sufficient to pay all interest on old indebtedness 3.85 times; for that period of four and one-half years the earnings on the old Preferred Stock were $121.49 per share and the earnings on the old Common Stock were $67.52 per share.

(R. 210) If the debtor had paid all of the interest in the period referred to above on all of its old indebtedness it would, as of December 31, 1944, have had available an excess over that requirement of interest of $34,000,000.00 for reduction of the bonded debt, additions, improvements, etc. Bring those figures down to date to the end of April, 1946, the amount which would have been available above and beyond all of the requirements for bank interest on all of the indebtedness would still have a surplus of $42,934,096.00 available for other corporate purposes such as improvements and retirement of debt. (Rec. 211) The 1944 earnings alone of the debtor before payment of excess profits taxes amounted to $53.50 on each share of the old Common Stock. (R. 212) During that year there was an excess profits tax of $40.62 per share on the old Common Stock, leaving a net of $12.88 which would have been available for the old Common Stock for that year. The excess profits tax is not any longer in existence. (The excess profits tax paid in 1944 was $30,207,438.00).

For the period January 1, 1941 to June 30, 1945, the debtor earned $71,291,766.00 which would have been allocable to the old stock of the corporation if reorganization had not been pending — The amounts charged by the Trustees from January 1, 1941, up to December 31, 1944, for additions and betterments, less the amount of new securities issued in payment therefor, were $63,149,267.00. (R. 212) In the year 1945 alone the sum of $14,420,968.00 was spent for additions and betterments.

m. On June 11, 1946, the date of the confirmation hearing, there was in existence further unanticipated reasons which had developed since the Commission and the Court approved the plan later rejected:

(1) The income tax rates, effective January 1, 1946, had been reduced in so far as corporations are concerned to a maximum of 38% of net earnings.

(2) Excess profits taxes were eliminated as of January 1, 1946.

(3) Capital stock taxes were eliminated as of January 1, 1946.

Beginning with January 1, 1946, excess profits taxes have been eliminated. In 1945 the debtor's excess profits tax was $30,207,438.00. (R. 212).

5. This Court will take judicial notice of its decision of December 16, 1946, *In the Matter of The Chicago, Rock Island and Pacific Railway Company,* on petition for writ of certiorari by the holders, or their representatives, of Choctaw, Oklahoma and Gulf Railroad Company First Mortgage and 5% Gold Bonds, which denied their claim for interest upon interest. This decision results in a savings of, to-wit, $500,000.00, for the debtor's estate, and increases by that figure the solvent position of the debtor. This decision is a development since the District Court refused to confirm the plan, but is a further justification for this Court to affirm the District Court.

It is therefore important that this Court determine whether a District Judge may exercise the discretion vested solely in him under Sub-Section (e) of Section 77 of the Bankruptcy Act, as amended, and refuse to enter an order confirming a plan of reorganization, or whether the District Judge can, by a writ of mandamus, be compelled by the United States Circuit Court of Appeals to confirm a plan of reorganization, regardless of the findings of controversial fact made by the District Judge at the time of his refusal to confirm the plan of reorganization.

CONCLUSION.

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit, directing that Court to certify and send to this Court for its review and determination on a day certain to be named therein a transcript of the record and the proceedings herein; that the judgment of said Circuit Court be reversed; and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated at Chicago, Illinois, July 1, A. D. 1947.

Respectfully submitted,

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as the Protective Committee for The Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock,

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